

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

: Civil Action
: No. 3:09CV620
: April 16 , 2013

COMPLETE TRANSCRIPT OF CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES: (Via telephone)

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1 (The proceedings in this matter commenced at
2 11:00 a.m.)

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4 THE COURT: Good morning. This is ePlus,
5 Inc. against Lawson Software, Inc., Civil 3:09CV620.
6 Would you please give your appearance and your name
7 when you speak.

8 MR. MERRITT: Craig Merritt and Paul Jacobs
9 at Christian & Barton for ePlus.

10 MS. ALBERT: Jennifer Albert and Michael
11 Strapp with Goodwin Procter for ePlus.

12 MR. CARR: Dabney Carr, Troutman Sanders, for
13 Lawson Software.

14 MR. THOMASCH: Daniel Thomasch together with
15 Richard Mark and Josh Krevitt with Gibson, Dunn &
16 Crutcher for Lawson.

17 THE COURT: There's a motion to expunge
18 ePlus's proposed findings of fact and for expedited
19 briefing, which is Docket No. 1062. And this morning
20 ePlus filed a letter, which I assume you have gotten a
21 copy of, counsel for Lawson.

22 MR. THOMASCH: Yes, Your Honor. This is
23 Mr. Thomasch.

24 THE COURT: Does ePlus's letter do anything
25 to your position, gentlemen?

1 MR. THOMASCH: Your Honor, this is Daniel
2 Thomasch. It doesn't change our position, Your Honor.
3 The letter makes clear that they apparently
4 misidentified the basis for their submission, which
5 was originally said to be pursuant to an order, a
6 scheduling order, dated March 11 of 2011. It was six
7 months before the contempt proceeding was even begun.

8 In the letter of today, they have changed and
9 indicated that while Your Honor issued a scheduling
10 order to deal with the proceeding we just completed
11 before Your Honor on January 24, 2013, they say that
12 order did not vacate the Court's prior order of
13 November 23, 2011, some 14 months ago, which had an
14 entirely different post-hearing procedure set forth in
15 it. It was different in the number of briefs, the
16 page limits of the briefs.

17 On January 24th of this year, in Docket 1002,
18 Your Honor issued an order that governed the
19 post-trial proceedings here. Paragraph G, bridging
20 pages 3 to 4, states, "If the Court determines that
21 post-hearing briefs are needed, the colorably
22 different issue and the infringement issue shall be
23 briefed in separate briefs and ePlus shall file its
24 opening post-hearing briefs on April 12, 2013, not to
25 exceed 25 pages." And it goes on from there.

1 No mention is made of any proposed findings
2 of fact or conclusions of law. We believed and
3 understood that to govern.

4 During the court proceeding, the Court
5 indicated that briefing would be submitted pursuant to
6 this schedule. Both of the parties recognized in
7 court that it might assist the Court to have a third
8 brief on damages. We took that position mutually and
9 in person and in front of the Court, and the Court
10 agreed to have a third brief submitted. Not a word
11 was said by ePlus about findings of fact or
12 conclusions of law.

13 And then on Friday, the 12th, at about
14 8:00 o'clock that evening, we received not only three
15 briefs, but 103 pages of exceedingly argumentative
16 findings of fact totaling more than 250 paragraphs.
17 We believe they are improper in form. They
18 essentially amount to a 100-page brief supplementing
19 69 pages of briefing that was otherwise submitted
20 pursuant to the Court order, and we think that's
21 simply improper, but certainly it was not called for
22 by the Court's order. And if the Court wants that,
23 then we feel that we need to make sure that the Court
24 is expecting such a submission from us.

25 Our preference, obviously, as we made the

1 motion to expunge is to do just that and to follow the
2 order that you set forth for the parties on
3 January 24.

4 THE COURT: Who's going to speak for ePlus?

5 MS. ALBERT: Your Honor, this is Jennifer
6 Albert for ePlus.

7 Our position is noted in our letter that we
8 submitted this morning. Unfortunately, Lawson's
9 counsel did not meet and confer with us yesterday
10 prior to filing the motion, and perhaps if they had,
11 we would have informed them that we were operating
12 consistently with the Court's prior order of
13 November 23, 2011, and perhaps we could have worked
14 something out.

15 Obviously, the proceeding is governed by
16 Federal Rule of Civil Procedure 52, which requires
17 that the Court find the facts specially and state its
18 conclusions of law.

19 So ePlus submitted its proposed findings of
20 fact and conclusions of law to assist the Court with
21 making the findings required under Rule 52. We do not
22 believe that expunging is appropriate. Certainly,
23 it's at the Court's discretion to grant Lawson any
24 sort of extension of time, but they could submit their
25 own proposed findings to meet our proposed findings,

1 and we don't believe that expungement is necessary or
2 appropriate.

3 THE COURT: Do you, Mr. Thomasch, believe
4 that Rule 52 applies to a contempt proceeding?

5 MR. THOMASCH: Your Honor, I believe Rule 52
6 would apply and that it would be appropriate to set
7 forth facts and conclusions. That rule does not call
8 for the submission of those. It puts an obligation on
9 the Court.

10 I don't think that a contempt proceeding must
11 have them, but I do not object, of course, to the
12 Court if the Court believes that Rule 52 should apply.

13 THE COURT: I guess my question is: Do you
14 believe that Rule 52 does apply? That is, that
15 findings of fact and conclusions of law are required
16 in a contempt proceeding?

17 MR. THOMASCH: I do not believe they are
18 required. I have not seen in *TiVo* or elsewhere the
19 Federal Circuit indicate that that is required, and so
20 I don't believe that that is necessarily the case.
21 The plaintiffs have taken the position all along that
22 this was a hearing, not a trial. I don't know that 52
23 by its terms necessarily applies, although it is
24 certainly within Your Honor's discretion in deciding
25 how to present your conclusions on the contempt

1 proceeding to do so pursuant to Rule 52.

2 THE COURT: Of course, Rule 1 says that the
3 rules apply to all civil actions and proceedings.

4 MR. THOMASCH: That is correct, Your Honor.

5 THE COURT: So I think maybe Rule 52 does
6 apply. I'm not going to draw any significance from
7 citing the wrong rule. I don't think I need to hear
8 that. The real question is, I guess -- I think ePlus
9 was legitimate in relying on both orders because in
10 the sense that the order, Docket No. 1002, certainly
11 didn't rescind Docket No. 849, which was issued
12 November 23, 2011. And if that's what they read -- it
13 would have been better, however, to have raised it so
14 that both parties are on the same footing.

15 I was the one who issued both orders and I
16 didn't terminate the effectiveness of Docket No. 849,
17 although I must say it was overcome to a certain
18 extent by events and by the provisions of the order
19 dated No. 1002, Docket 1002, at least insofar as the
20 pagination limits and the briefs, but it did
21 contemplate in No. 849 the proposed findings of fact
22 and conclusions of law.

23 However, ePlus has, in effect, expanded the
24 page limits of the order in Docket No. 1002 by citing
25 all of the reference material in the proposed findings

1 of fact as part of the briefs that were filed under
2 the 25-page limit. Many of the citations in there are
3 PFF, which I guess is proposed findings of fact,
4 number such and such, and such and such, and such and
5 such. So, in effect, they have extended the page
6 limits.

7 I have not had an opportunity to study all of
8 this material, but I find helpful the way the briefs
9 are written in that they present the issues in a
10 concise way, whereas, the findings of fact go beyond
11 and provide detailed authority for that process.

12 So I guess I'm not inclined to expunge it.
13 It would be perhaps appropriate for you to refile the
14 briefs without changing any of the text but putting in
15 other citations. Take the citations that you think
16 are important from the cited proposed findings of fact
17 and put it in the brief.

18 It probably would have been helpful had
19 you-all discussed the matter generally and concluded
20 that maybe a larger page limit was required, and I
21 would have entertained that had you-all done it.

22 So, I guess, that it having been done,
23 you-all have a lot more time from the conclusion of
24 the trial, Mr. Thomasch, than has the other side to
25 ready your papers, and I would prefer to have this

1 procedure concluded on the schedule that I set.

2 Basically, I fear that if we don't do that,
3 it could be well into the summer, the end of the
4 summer, before I get to this because I'm leaving -- I
5 have a very heavy trial schedule between now and June
6 and not much time to work with these issues. And then
7 in June I'm going to be gone for a couple of weeks and
8 won't really be able to return to any of it until the
9 middle of July. So I would prefer to keep to the
10 original schedule.

11 It seems to me that if I require them to
12 change the citations in the brief, that just delays it
13 getting to you, whereas you can cross-reference the
14 citations to the proposed findings of fact and know
15 what they're talking about if you want to do that.

16 I think it would be easier for me to have the
17 briefs and the citations, but that may chop it up too
18 much.

19 So how would you propose to proceed,
20 Ms. Albert? You did take advantage of them. You have
21 expanded the pagination. Well, that's not right.
22 "Take advantage of" connotes an intentional act to do
23 that and I don't mean to imply that. They are
24 disadvantaged probably if they are held to the same
25 situation you were held to.

1 MS. ALBERT: Certainly ePlus would prefer to
2 stick with the Court's original schedule and we've
3 made arrangements, for example, to be there on
4 April 26 for the oral argument. So we would prefer to
5 stick with the original schedule.

6 We are amenable to whatever format of the
7 briefing Your Honor prefers. We think, you know, it's
8 not much of a problem for Lawson to refer back to the
9 proposed findings of fact and the evidence cited
10 there, you know, to cross-reference it from the
11 briefs.

12 THE COURT: No, it's more work for me to do
13 it that way.

14 MR. STRAPP: Your Honor, if I can just jump
15 in. This is Michael Strapp.

16 If it's easier for Your Honor to have the
17 proposed findings of fact and conclusions of law, I
18 think that perhaps the best course of action would be
19 for Lawson to also file its own proposed findings of
20 fact and conclusions of law. And while we, obviously,
21 recognize it's a large undertaking to put together
22 three briefs and a proposed findings of law and
23 conclusions of law, we were able to do so using our
24 team in the three days between when the evidence was
25 closed and Friday when we submitted the briefs.

1 THE COURT: Well, Mr. Strapp, that begs the
2 question perhaps: When did you actually start this
3 process? Therefore, you had probably read out the
4 rule before the conclusion of the evidentiary
5 proceeding. So you probably have had more time than
6 they've had maybe.

7 So do you really want to get into that one?

8 MR. STRAPP: No, I don't. And to the extent
9 that they need an extra day, obviously they can take
10 an extra day. We just obviously want to try to stick
11 to the schedule that Your Honor has set so that things
12 don't get moved back.

13 THE COURT: All right. Mr. Thomasch, do you
14 have anything to say?

15 MR. THOMASCH: Your Honor, we would request
16 more time. I don't understand the concept that the
17 November 23rd order had not been superseded. Every
18 single paragraph relates to something that was later
19 changed. And the Court's schedule January 24 put
20 forth a post-trial process that we did not understand
21 to include findings of fact and conclusions of law.

22 We were not preparing those as the case
23 proceeded. We would ask for more time if Your Honor
24 wants it. We will submit anything Your Honor finds
25 helpful or wants, but this procedure we do find odd.

1 I do note that the 11-23-2011 order also
2 indicates that plaintiff is to present a single reply
3 to the proposed findings of fact and conclusions of
4 law and not both a reply and a brief. I would ask
5 Your Honor for clarification as to which parts of the
6 2011 order ePlus gets to abide by and which parts are
7 not in play because I'm left confused by the
8 situation.

9 We would ask for more time if you're willing
10 to accept and wish us to brief more. It is, in
11 effect, another 100-page-long brief from our
12 perspective. Individual findings of fact span more
13 than a page and a half in length on occasion, and they
14 start reading with introductory phrases such as,
15 "Contrary to representations by Lawson's counsel."

16 We would argue that is not a finding of fact
17 but is simply an argument. And that permeates these.
18 It puts us in a -- we think we're in a very difficult
19 position in not only how to respond, but how to do so
20 appropriately.

21 THE COURT: All right. Well, there is some
22 argument in there. I think from my standpoint the
23 principal objective has got to be to be reasonable
24 with both of you and at the same time bring the matter
25 to a conclusion as timely as possible.

1 And so I'm not going to grant the motion to
2 expunge. I'm going to allow the defendants to file
3 proposed findings of fact and conclusions of law, and
4 I don't want any reply findings of fact and
5 conclusions of law. I want the briefing to be
6 followed in accord with the schedule set in the order
7 of January 24, which gives you reply briefs. And so
8 that's what we'll do.

9 So you file the three briefs that are
10 contemplated in the response of 25 pages. EPlus, you
11 file a reply of 15 pages. And then, Lawson, you get
12 to file proposed findings of fact and conclusions of
13 law.

14 MR. THOMASCH: Your Honor, on what date would
15 you want our proposed findings of fact and conclusions
16 of law?

17 THE COURT: I'm looking for my book right
18 now. What date are they due now?

19 MR. THOMASCH: They are not called for, Your
20 Honor.

21 THE COURT: No, no, no. What date are your
22 briefs due?

23 MR. THOMASCH: Oh, our briefs are due this
24 Friday, Your Honor.

25 THE COURT: And that is the 19th?

1 MR. THOMASCH: The 19th, yes, it is, Your
2 Honor.

3 THE COURT: Okay. Well, you file them on the
4 19th.

5 When is your reply brief due, Ms. Albert?

6 MS. ALBERT: April 23rd by 5:00 p.m.

7 THE COURT: All right. You file your
8 conclusions of law and findings of fact on the 22nd,
9 Mr. Thomasch.

10 MR. THOMASCH: Yes, Your Honor.

11 THE COURT: If you want to file them on the
12 19th, you can.

13 All right. Anything else that you-all need
14 to take care of from your standpoint?

15 MR. THOMASCH: Nothing from Lawson, Your
16 Honor.

17 THE COURT: Let me ask you this question,
18 folks: Now that all of the evidence is in, has either
19 side thought it might be advisable to try to settle
20 the controversy in its entirety?

21 MR. THOMASCH: Your Honor, this is Mr.
22 Thomasch.

23 We reached out to plaintiff's counsel before
24 the hearing and proposed a meeting without
25 precondition. That offer was not accepted. We

1 attempted to have settlement negotiations and we've
2 received no substantive response from ePlus.

3 MR. MERRITT: Your Honor, this is Craig
4 Merritt. I've been involved in some of that. And Mr.
5 Thomasch may not be aware, but late last week there
6 was a discussion between general counsel for the
7 parties, and I think there's some hope that that
8 discussion may continue.

9 THE COURT: My suggestion is that you're
10 better off settling the case and doing so promptly.
11 And it needs to be done. The question is whether you
12 want one of our magistrate judges to assist you or
13 whether you want the assistance of somebody else.

14 I believe it started off, the settlement
15 process in this case started off with Magistrate Judge
16 Dohnal. It may have been Magistrate Judge Lauck. I
17 can't remember. Which magistrate judge started off?

18 MR. MERRITT: It was Judge Dohnal, Your
19 Honor.

20 THE COURT: All right. Well, I would suggest
21 that you talk today. And if you want Judge Dohnal to
22 do it or you want to hire a private mediator, you need
23 to go on and get it done, and it ought to be done by
24 people who aren't on the trial team.

25 There are economic advantages to concluding

1 the matter in its entirety anyway. I don't know
2 whether the presence of those things that are still
3 pending in the Court of Appeals foreclose a settlement
4 or what they do, but if they do, you need to tell each
5 other that. If they don't, then you better settle the
6 case because if I were involved in the case, I would
7 have to think that if I were Lawson, the idea of a
8 contempt citation is an unpalatable one. It can be
9 costly to ePlus. Further litigation can reasonably be
10 expected given that Lawson has fought every step of
11 the way and is convinced they're not wrong on this
12 issue.

13 And at some point it seems to me that perhaps
14 a business resolution may be the right way to solve
15 the problems that are presented by the circumstances
16 of this case.

17 So I want you to sit down and go through the
18 process of talking. If you want Magistrate Judge
19 Dohnal, I'll call him and ask him to put you ahead on
20 his schedule, and do what he can. If you want to get
21 somebody else, you need to get somebody who can get up
22 to speed fairly quickly, but they have to get moving
23 and get moving quickly.

24 So I'll hear back from you by the end of --
25 what is today? Tuesday? I'll hear back from you on

1 Thursday as to whether you want Magistrate Judge
2 Dohnal to assist you or not.

3 MR. MERRITT: We will do that, Your Honor.

4 THE COURT: In the meantime, I just think we
5 continue to march, but it seems to me to be a
6 proposition that ought to be resolved with the
7 business people at this stage.

8 All right. Thank you very much.

9 MS. ALBERT: Thank you, Your Honor.

10 MR. THOMASCH: Thank you, Your Honor.

11 THE COURT: Bye.

12 (The proceedings were adjourned at 11:28
13 p.m.)

14
15 I, Diane J. Daffron, certify that the
16 foregoing is a correct transcript from the record of
17 proceedings in the above-entitled matter.

18 /s/

19 _____
20 DIANE J. DAFFRON, RPR, CCR

DATE